No. 86-108

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

v.

DANA BRAUNSKILL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE

Petitioners rely on the Statement of the Case included in Petitioners' Brief on the Merits, supplemented only by the following additional facts.

On March 3, 1987, the United States Court of Appeals for the Third Circuit issued an order vacating its order and decision affirming the district court's grant of a writ of habeas corpus to Dana Braunskill and granting rehearing. (Appendix A). On March 5, 1987, the same court scheduled rehearing in the *Braunskill* matter for April 9, 1987. (Appendix B).

LEGAL ARGUMENT

POINT I. STRONG FEDERAL INTERESTS MANDATE THE CONSIDERATION OF DANGEROUSNESS AND THE CHANCES OF SUCCESS ON APPEAL IN DETERMINING WHETHER TO STAY RELEASE OF A SUCCESSFUL HABEAS PETITIONER PENDING APPEAL.

In his brief on the merits, respondent invokes principles of comity and federalism, the wording and history of Fed. R. App. P. 23(c), and an asserted status as a pre-trial indictee, to justify the decision below that federal courts are unequivocally precluded from considering issues such as a habeas corpus petitioner's dangerousness to the community and the likelihood that the order granting release will be reversed on appeal when determining whether to stay release pending appeal.

Respondent's reliance on these factors and on the decision of the United States Court of Appeals for the Third Circuit in *Carter v. Rafferty*, 781 F.2d 993

(3d Cir. 1986) is mistaken. The tunnel vision approach of *Carter*, which limits the federal court's inquiry to the habeas petitioner's amenability to future federal process, blinded the *Carter* court to concerns of comity and federalism, the wording and history of Rule 23(c) and 28 U.S.C. § 2243, the realities of widespread practice, and the actual position of a state-court convicted petitioner who is successful in district court.

Initially, it is unrealistic to analogize respondent to a pre-trial indictee. Such a view ignores the modern role of federal habeas corpus review of state criminal proceedings as closely akin to appellate review.

From the earliest, the Judiciary Act of 1789 contemplated that the Supreme Court and lower federal courts had authority to issue writs of habeas corpus only in aid of individuals detained in allegedly unlawful federal custody. This practice held until, following the Civil War, Congress enacted the Habeas Corpus Act of 1867, which expanded power to issue the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States." 14 Stat. 385. *See generally* L. Yackle, *Postconviction Remedies*, § 19 at 85-86 (1981). For the next 80 years, federal habeas review of state prisoners' claims remained limited in nature and scope.

Since the landmark decision in *Brown v. Allen*, 344 U.S. 443 (1953), federal habeas corpus review of state criminal convictions has grown rapidly in scope, leaving as a distant memory the narrow jurisdictional inquiry that previously limited federal habeas corpus review.

Important new ground was broken in the *Brown* case. For the first time, the *Brown* court expressly

held that all federal constitutional questions are cognizable in federal habeas corpus. Additionally, the court made clear that federal courts are not bound by state court judgments on federal issues in habeas cases even if those federal claims were "fully and fairly" litigated in state court. 344 U.S. at 458. Moreover, *Brown* recognized the discretionary power of a federal habeas court to hold factual hearings, when appropriate, even in the face of claims that the state proceedings were adequate and the findings of fact correct. 344 U.S. at 464-65.

Ten years later, the decisions in *Fay v. Noia*, 372 U.S. 391 (1963) and *Townsend v. Sain*, 372 U.S. 293 (1963) helped to establish federal habeas corpus review as a general post-conviction remedy for prisoners convicted in either state or federal court. *Noia* eliminated procedural barriers to federal habeas review by holding that a petitioner need not seek certiorari review in the Supreme Court before petitioning in federal district court for habeas relief and that a state court procedural default by petitioner would not bar habeas consideration of a federal claim in the absence of a deliberate bypass of state remedies. 372 U.S. at 439. In *Townsend*, the Court set forth the standards, later codified into 28 U.S.C. § 2254, which govern the effect to be given to state court findings of fact. 372 U.S. at 313.

These and other cases have transformed federal habeas corpus review of state criminal proceedings from a narrowly focused jurisdictional inquiry into a general post-conviction remedy, akin to, though not identical with, appellate review. This new role for habeas should inform the Court's interpretation of the "sparsely worded" Rule 23(c). Thus, a State prisoner

who successfully petitions for a habeas writ in federal district court is more properly analogized to a convicted defendant whose conviction has been called into question on appeal than to a pre-trial indictee.

In *Carter v. Rafferty*, relied upon heavily by the courts below and respondent, the Third Circuit, without explanation or citation to authority, classified a successful habeas petitioner as being in the position as "any other state-indicted, not yet tried individual." 781 F.2d at 998. Petitioners submit that the better approach, given the widespread use of habeas, and the broad scope of review of virtually any claim that can be couched in Federal constitutional terms, is to consider the successful petitioner akin to a respondent in an appeal filed by the State. While Rule 23(c) may indeed be "sparsely worded," there is nothing in its text which would require federal courts to foreclose all consideration of the dangerousness of an individual who may be released. Indeed, its interpretation should be informed by recognition of this greatly expanded role. The presumption of release in the rule is not irrebutable. A prisoner shall be enlarged "unless the court . . . shall otherwise order." Fed. R. App. P. 23(c).

It is unrealistic to blindly compare successful petitioners in district court to pre-trial indictees. The common practice has been to treat these petitioners as similar to applicants for bail pending appeal. For example, in *Shaffer v. Clusen*, 518 F. Supp. 936 (E.D. Wis. 1981), the court granted a writ to a prisoner convicted in state court of second degree murder and attempted armed robbery. The order went on to provide, however, that "the execution of the writ will be stayed pending the results of the appeal." 518 F.

Supp. at 965. *See also United States ex rel. Rice v. Vincent*, 486 F.2d 215 (2d Cir. 1973), *Kennedy v. Pinkney*, 473 F. Supp. 1279, 1285 (C.D. Ill. 1979), and *Rudolph v. Powell*, 478 F. Supp. 849 (E.D. Wis. 1979).

This approach has much to recommend it, including a recognition that in many cases it will not be possible to re-try the successful habeas petitioner because of the passage of time, the unavailability of witnesses, the exclusion of key evidence, or other reasons. Preservation of the status quo pending appeal, especially where there is a likelihood of success on appeal, is more appropriate given these considerations. Furthermore, the comparison to a pre-trial indictee is incorrect in the sense that if the federal district court decision is overturned on appeal, a new trial does not occur; the valid state conviction stands.

Respondent asserts that a restrictive reading of Rule 23(c) promotes federalism and comity because it requires federal courts to refrain from "interfering with matters traditionally and properly reserved for action by states themselves." (Rb-21). This Court has consistently recognized the strain that federal habeas proceedings can put on comity, *see, e.g., Fay v. Noia*, 372 U.S. at 418-20, and has attempted to minimize that strain by creating rules which do not have the effect of nullifying completely state criminal proceedings.

A rule which has the effect of precluding the State from appealing an adverse district court ruling scarcely can be said to promote federalism. Should the *Carter* rationale stand, a federal court which grants habeas corpus relief will force the state to a choice between unleashing potentially dangerous in-

dividuals on the community while prosecuting an appeal or foregoing appellate review. The argument that the petitioner's release does not involve a federal interest ignores the fact that he has been released by the federal courts based on federal law and the United States Constitution and that the state's right to appeal issues of this type has been provided by the United States Congress. To assert that considering the dangerousness of a petitioner is not a federal interest makes it appear that federal courts have no valid concern for the safety of the communities in which they sit.

Judicial myopia of this sort hardly helps build public confidence in the federal legal process since it is readily perceived as cavalier disregard for the possible consequences of a judicial decision to grant the writ. The suggestion by respondent that the State's own courts can make the finding of dangerousness (Rb-21) is erroneous in some respects and disingenuous in others. Clearly, the type of dangerousness that would justify civil commitment, as suggested by the *Carter* court, 781 F.2d at 996, will arise so infrequently as to be meaningless in this context.

Additionally, there is yet another key federal interest—uniform application of federal law—which is ill-served by a rule which effectively cuts off meaningful appellate review of district courts.

The *Carter* decision noted with apparent approval the practice of granting "conditional writs" under the terms of which States may re-try habeas petitioners within a certain period of time or release them. 781 F.2d at 994. *See also United States ex rel. Thomas v. State of New Jersey*, 472 F.2d 735 (3d Cir. 1973). Respondent concedes, citing *Carter*, the legality of

these conditional writs, although there is nothing in Rule 23 which refers to them. Apparently there are no standards governing the issuance of these writs. If indeed the "sparsely worded" Rule 23 authorizes these writs, it does not require a lyric leap to find within the Rule the power of a federal court to consider the dangerousness of an individual when deciding whether to stay release pending appeal.

Petitioners assert that 28 U.S.C. § 2243, which commands the court to "dispose of the matter as law and justice require," mandates that all relevant factors, including dangerousness and likelihood of success on appeal, be considered.

POINT II. THE ISSUES PRESENTED ARE NOT MOOT

Respondent, in Point Two of his brief, claims that this is an inappropriate case for resolution of the issues raised by the parties since this case either is or will become moot before it is decided by this Court. Recent developments in the Third Circuit Court of Appeals have conclusively resolved this issue in favor of petitioners.

The basis of respondent's mootness contention is the fact that on December 2, 1986, the Third Circuit affirmed the decision of the district court which granted habeas corpus relief in this case. As evidenced by Appendix A; however, on March 3, 1987, the court of appeals granted petitioners' motion for a panel rehearing on the merits of the appeal and vacated its previous opinion and order. On March 5, 1987 the panel set a rehearing date of April 9, 1987. Thus, the Third Circuit will not consider the merits of the appeal until two weeks after this court hears

argument on the issue of whether a stay pending appeal should have been permitted. The circuit court decision to grant a rehearing, of course, has nothing to do with the issues presented to this Court—the standards for granting a stay of release on habeas corpus pending appeal of the decision granting habeas corpus relief.

Any further argument that this case may become moot prior to a decision by this Court is speculative. Succinctly stated, mootness is no longer an issue in this case.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the order of the United States Court of Appeals for the Third Circuit denying petitioners' request to stay respondent's release during the pendency of the State's appeal be reversed.

Respectfully submitted,

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Attorney for Petitioners

JOHN G. HOLL
Assistant Attorney General and Chief of Staff

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ALLAN J. NODES
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ON THE BRIEF

DATED: March 16, 1987

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86-5204

DANA BRAUNSKILL
v.

GARY HILTON, Superintendent,
New Jersey State Prison,
Trenton, New Jersey and
W. CARY EDWARDS,
Attorney General of New Jersey

(D.C. Civ. No. 85-2008)

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM and GARTH, *Circuit Judges.*[1]

The petition for rehearing filed by the State of New Jersey in the above-entitled case having been submitted to the judges who participated in the decision of this Court, the petition for panel rehearing is granted. The not-for-publication per curiam opinion of the panel, filed December 2, 1986, and the judgment entered thereon is hereby vacated.

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[1] Prior to the receipt of the petition for rehearing, Judge Adams retired from the Court. Judge Adams therefore did not participate in the consideration of the petition.

BY THE COURT,

/s/ A Leon Higginbotham
Circuit Judge

Dated: March 3, 1987

APPENDIX B

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
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SALLY MRVOS
CLERK

TELEPHONE
215-597-2995

March 5, 1987

Raymond S. Gurak, Esquire
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N.J. Division of Criminal Justice
CN 086
Trenton, NJ 08625

Re: Dana Braunskill vs. Gary Hilton etc., et al.
Cary Edwards, etc., et.,
No. 86 5204

Mark H. Friedman, Esquire
Office of the Public Defender
20 Evergreen Place—First Floor
East Orange, NJ 07018

Dear Counsel:

The above-entitled case has/have been listed for rehearing Thursday, April 9, 1987.

This advance notice is provided so that you may make arrangements to be prepared to appear and present argument if it is required. The panel will determine whether there will be oral argument and, if so, the amount of time allocated therefor. (See Third Circuit Internal Operating Procedures, Ch. II.) No later than one week prior to the disposition date, you will be advised whether oral argu-

ment will be required, the amount of time allocated by the panel, and the specific date on which argument will be scheduled.

Kindly acknowledge receipt hereof on the enclosed copy of this letter and advise the name of the attorney who will present oral argument if argument is required by the panel. In addition, please indicate whether or not s/he is a member of the bar of this Court. Membership is not necessary if counsel represents a U.S. government agency or officer thereof or if the party is appearing pro se. If the attorney is not a member of the bar of this Court, an application for admission will be forwarded, which should be completed and returned to this office without delay.

Very truly yours,
SALLY MVROS, Clerk

/s/ RUTH MARTINEZ
Ruth Martinez, Deputy Clerk

rm

Receipt acknowledge by ALLAN J. NODES Date March 9, 1987

Name of attorney arguing ALLAN J. NODES

Representing: Appellant/Petitioner ( ) Intervenor ( )
Appellee/Respondent ( ) Amicus ( )

Member of Bar: Yes __x__ No _____